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THE AUTHORITY OF THE CONSTITUTIONAL COURT OF GEORGIA OVER ISSUES OF THE CONSTITUTIONALITY OF REFERENDUM AND ELECTIONS

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The competence of the Constitutional Court underwent significant modification under the Constitutional Law[1] of 27 December, 2005. Prior to this amendment, the competence of the Constitutional Court was specified as follows: the Constitutional Court of Georgia "examines disputes related to the constitutionality of referendums and/or elections." (Article 89(1)(d) of the Constitution of Georgia.) Within the scope of this authority, the Constitutional Court was charged with examining disputes arising from the constitutionality of the appointment (or non-appointment) of referendums and elections — two of the most important aspects of direct democracy — and those issues relating to the constitutionality of a particular referendum question as well as the holding of referendums and elections.

Due to the special importance of referendums and elections in establishing and maintaining a state governed by the rule of law, the Constitution of Georgia envisages a number of requirements with regard to the application of these types of direct democracy. Prior to the above-mentioned constitutional amendment, the objective of the Constitutional Court was to establish (of course, in the case an application was made by a relevant subject) whether the requirements of the basic law of the country were being complied with while the institutions of the referendum and the election were in use. Determining the issue of the constitutionality of the norms that regulate these institutions (as well as any other norm or normative act) was possible under another sphere of competence of the Constitutional Court. Therefore, a subject was unable to challenge (and maybe it was really not disputable in the first place) the constitutionality of the so-called "norms" regulating elections or referendums, and directly required the examination of the constitutionality of the elections (referendum) to be held or held. For example, in 2001 the plenum of the Constitutional Court of Georgia examined complaints filed by three groups made up of Georgian Members of Parliament (each group consisted of at least one fifth of the total number of Georgian MPs) against the Central Election Commission of Georgia[2]. The plaintiffs demanded that the Constitutional Court declare the following actions non-constitutional in relation to Article 49 of the Constitution of Georgia: 1) The appointing of a second round of Parliamentary elections in the Abasha Election District, to be held on 14 November, 1999 and adhering to the majoritarian system; 2) The results of the second round of the Georgian Parliamentary majoritarian elections held on 14 November, 1999 in the Poti Election District; 3) The 19 November, 1999 resolution of the Georgian Central Election Commission on the "Invalidation of the results of the repeat voting in Election Precinct # 13 of the Tsalenjikha election District". Under its 30 March, 2001 decision, the Plenum of the Constitutional Court of Georgia granted all three complaints, because it ruled that the elections in the above-mentioned districts had been held in violation of the provisions of Article 49 (1) of the Constitution of Georgia, which prescribes that Parliamentary elections should be determined by anonymous vote, pursuant to the principles of universal, equal and direct suffrage. The Constitutional Court established the necessary circumstances for making the above decision by virtue of the study of information provided in constitutional complaints, declarations and clarifications provided by participants in the constitutional process, witness statements and the written evidence included in the

[1] Legislative Bulletin of Georgia, No 1, 04.01.06, Article 2

[2] Constitutional Court of Georgia. Decisions, 2000-2001. Tbilisi, 2003. pg. 73-94.

case (i.e. — in this particular case the Constitutional Court declared the elections unconstitutional on the basis of factual circumstances so that the issue of the constitutionality of the regulating norms was not raised at all.

Another case that the Constitutional Court of Georgia examined in 2009 — "Citizens of Georgia — Guram Saneadze and Irakli Kotetishvili v. the Parliament of Georgia" — focused on the constitutionality of Article 9(12) of the Organic Law of Georgia on the Election Code of Georgia in relation to Article 28(1) of the Constitution of Georgia.[3]

According to the challenged norm "it is prohibited to make amendments to the voters' list during the 10 days prior to the election day and any modifications proposed between the 19th and 10th day prior to election day shall be entered only subject to judicial approval." The plaintiff noted that he returned from a business trip on the day of the elections and went to his local election precinct where it appeared that his name had not been entered on the voters' list and that therefore he was not allowed to vote. Hence, the plaintiff believes that the — now challenged — Elections Code norm infringes upon the universal right to suffrage that is recognized and guaranteed under Article 28(1) of the Constitution of Georgia. Under the 24 January, 2005 decision the Constitutional Court of Georgia validated the complaint and declared the above-mentioned Elections Code norm unconstitutional, as it unjustifiably restricts citizens' suffrage. The Constitutional Court noted (quite correctly) that the creation of the voters' list is the responsibility of relevant state institutions. When a citizen is not entered on the unified voters' list through the fault of the relevant state institution this should not form a basis for limiting suffrage. The Elections Code should ensure that, in Georgia, the universal, constitutional right to vote is upheld in a *de facto* manner, not just officially.

In this case, the Constitutional Court of Georgia declared the election-regulating norm in question to be unconstitutional, so that the general issue of the constitutionality of the elections was not raised.

Such was the competence of the Constitutional Court of Georgia and the practice of its application in the field under review, which, in our opinion, fully met the goal of enforcing the judicial protection of constitutional legitimacy with regard to election and referendum issues.

In late 2005, following the amendments to the Constitution of Georgia, the above-mentioned two independent powers of the Constitutional Court were merged under one type. As a result of this legislative shift, the Constitutional Court will henceforth, in certain cases, be unable to examine issues of constitutionality with regard to elections or referendums.

The Constitutional Court will examine issues of the constitutionality of an election or referendum only in cases in which a relevant subject concurrently challenges the constitutionality of the norms regulating the election/referendum. Hence, if no one openly challenges the constitutionality of the norms regulating elections/referendums, but the election or referendum in question was held in violation of the requirements of these norms and of the Constitution, then this issue may not be within the jurisdiction of the Constitutional Court.

As for the possibility of the examination of the norms regulating elections/referendums separately from the election/referendum itself, in our opinion, nothing has changed in the competence of the Constitutional Court in this regard. Even following the above-mentioned modifications the Constitutional Court is authorized to examine the issue of normative constitutionality regulating the elections or a referendum separately within the scope of the norm-controlling authority granted thereof under the Constitution and legislation. For example, under the competence stipulated in Article 89(1)(f) of the Constitution of Georgia and Article 19(1)(e) of the Organic Law of Georgia on the Constitutional Court of Georgia, on the basis of a citizen's complaint, the Constitutional Court of Georgia may consider and rule on the issue of the constitutionality of any of the norms of the Elections Code in conjunction with the fundamental human rights and freedoms recognized under Chapter 2 of the Constitution of Georgia. We use this example because a citizen, under the Legislation of Georgia regarding the Constitutional Court does not have the right to challenge the overall constitutionality of an election/referendum but (s)he can challenge the constitutionality of the norms regulating the election/referendum.

Therefore, subsequent to making the above-mentioned modifications to the competence of the Constitutional Court, the competence of the Constitutional Court in relation to the resolution on the issues of the constitutionality of elections and referendums was formulated as follows:

1) The Constitutional Court is authorized to examine the constitutionality of elections and refer-

[3] Constitutional Court of Georgia. Decisions, 2005, Tbilisi, 2006, pg. 5-17

endums only together with the issue of the constitutionality of the norms that regulate these activities;

2) The Constitutional Court does not have the authority to examine the constitutionality of only elections and referendums; it also has the authority to examine the constitutionality of other activities besides elections;
3) The Constitutional Court is authorized to examine the issue of the constitutionality of the norms regulating elections and referendums separately.

This merging of the absolutely independent competencies of the Constitutional Court, the mandating to examine those questions together, resulted, on the one hand, in the limiting of the authority of the Constitutional Court, and on the other hand it created a strong potential for misunderstandings which will definitely appear in the judicial practice during the application of these competencies.

For example, if a dispute about the constitutionality of an election is to be mediated, then a declaration by the Constitutional Court of the norms regulating elections in general excludes their application during the elections to be held, for, pursuant to the Constitution of Georgia, such legal norms will no longer have legal force from the instant the Constitutional Court publishes a relevant decision (Article 89(2)). In such cases the Constitutional Court actually can not legally issue judgments on the constitutionality of the elections to be held as the Constitutional Court cannot go beyond its "norm-controlling" mandate.

The same problems arise when examining disputes related to the constitutionality of an election/referendum which has already been held. Since the legislation has directly linked the mandate of the Constitutional Court in this field to establishing the constitutionality of the norms regulating elections/referendums, then naturally the Constitutional Court cannot evaluate and rule on specific, provisional violations of constitutional norms identified during a specific election/referendum. The Constitutional Court now has a different objective. In the first place, it should decide whether or not the challenged norms regulating elections/referendums are constitutional. After doing this (but as part of the same proceedings), provided the Constitutional Court has deemed the appealed norms unconstitutional, it has to answer another question as well: what was the impact of these unconstitutional norms on the overall constitutionality of the election/referendum in question? As if everything is clear. Any election/referendum carried out pursuant to unconstitutional norms should be regarded as "unconstitutional". In our opinion, however, this is not as simple as it seems.

The thing is that the electoral regulatory norm which is declared unconstitutional by the Constitutional Court, as mentioned above, loses legal force only after the Constitutional Court publishes a relevant decision. Therefore an election which has already been held cannot then be declared unconstitutional, and the results cannot be declared invalid, on the basis of a Constitutional Court decision. The decision of the Constitutional Court will be applicable only to future elections, that is, a norm which has been declared unconstitutional may not be used in the following elections.

The examples brought above, in our view, illustrate the necessity of reverting the regulation of the Constitutional Court's legislative mandate on issues of electoral constitutionality to the status quo prior to the adoption of the 27 December, 2005 Constitutional Law (i.e. — the competence of the review of disputes related to the constitutionality of the norms regulating elections/referendums and the constitutionality of elections/referendums to be formulated as two separate mandates of the Constitutional Court).

The fact that, following the passing of the 27 December, 2005 Constitutional Law, the relevant amendments have not yet been made to the legislation of the Constitutional Court is to be noted as well. The Organic Law on the Constitutional Court of Georgia contains the original wording of this mandate, namely, the Constitutional Court is authorized to examine and decide on "the dispute on the constitutionality of a referendum or elections" (Article 19(1) (d)).

Naturally, issues related to the mandate of the Constitutional Court are regulated in the section of the Organic Law of Georgia on the Constitutional Court of Georgia according to the content of the competence under review in a way that it does not give regard to the essence of the above-mentioned constitutional amendment, while the constitutional reform required a new regulation of the competence of the Constitutional Court related to elections/referendums by way of specific legislative acts. The legislative body has not done or has yet been unable to do this. Nevertheless, we deem it requisite to examine the essence and scope of this authority pursuant to the existing legislative norms.

First of all, it is necessary to ascertain exactly which of the elections of which body or official falls under

the competence of the Constitutional Court. It is clear that electoral issues are regulated by the Organic Law of Georgia on the Election Code of Georgia.[4] Pursuant to this law, elections encompass "the elections of representational bodies of the public administration and the officials of the public administration through general elections" (Article 3(a)). By this definition 'public administration' covers everything from state authorities to local self-governance bodies, so therefore, elections covered under the Elections Code of Georgia envisage the elections of the President of Georgia, the Parliament of Georgia, the Sakrebulo (city council), the Gamgebeli (the individual local self-government representative) and the mayors (Article 1). The Organic Law of Georgia when focusing on the Constitutional Court of Georgia also rests on the same to set forth constitutional control with regard to the elections, namely, the content of Article 37 of this law, as well as other norms which suggest that the Constitutional Court of Georgia is authorized to examine disputes related to the constitutionality of the elections of the President of Georgia and the Georgian Parliament, as well as the Sakrebulo, Gamgebeli, and mayor.

Within the scope of the competence under review, the subject of the dispute may be the facts of the alleged violation of the provisions of the Constitution of Georgia on the appointment and the holding of the elections of the President of Georgia, the Parliament of Georgia, the Sakrebulo, Gamgebeli, and mayor.

The Constitutional Court may test the constitutionality of an election only in cases in which its regulating norm is provided in the constitution. Naturally, all norms regulating the elections process can not be stipulated in the constitution. The constitution sets forth only the basic, substantial matters surrounding elections, and outlines the main principles for holding elections. Therefore, the jurisdiction of the Constitutional Court may include only the specific facts of the violation of these principles and norms, which may be expressed in the legislative acts, as well as through the actions of relevant subjects.

Considering the above-mentioned, the authority of the Constitutional Court of Georgia comprises the review and resolution of the constitutionality of the elections with regard to the following disputed issues:

1. The election of the President of Georgia was appointed in violation of the provisions set forth in Article 70(7), (10), and/or Article (3); and/or were not appointed regardless of the same provisions;
2. The election of the President of Georgia was held in violation of Article 28 and Article 70 of the Constitution of Georgia;
3. General elections or repeat elections for the Parliament of Georgia or elections for the early termination of the authority of a member of the Parliament of Georgia were appointed in violation of Article 50(3), (5), and Article 73(2) or were not appointed regardless of the same provisions;
4. Elections of the Parliament of Georgia were held in violation of the provisions of Article 28, Article 49(1) and (2) and Article 50 of the Constitution of Georgia;
5. The elections of the local self-governance bodies were appointed in violation of the provisions of Article 2(4) and Article 73(2) of the Constitution of Georgia or were not appointed regardless of the same provisions;
6. Elections of local self-governance bodies were held in violation of the provisions of Article 2(4) and Article 28 of the Constitution of Georgia.

As for the constitutionality of a referendum, the jurisdiction of the Constitutional Court may cover disputes on the following issues:

1. The referendum was appointed in violation of Article 74(1) of the Constitution of Georgia or was not appointed regardless of the same provisions;
2. The holding of a referendum contravenes with the provisions set forth in Article 74(2) of the Constitution of Georgia;
3. The referendum was held in violation of the provision of Article 74(3) of the Constitution of Georgia.

In our opinion, the authority of the Constitutional Court of Georgia in this field should not be limited to the above-mentioned cases. It is necessary to conceptualize the role of judicial authority in a new way and it should be further strengthened in the process of the formation of government bodies through elections. Namely, it would be advisable if the whole electoral process were to be led by the constitutional and general courts. For this purpose, first of all, the electoral mandates of these two institutions of judicial authority should be clearly separated. The objective of the general courts should be the operative dis-

[4] Legislative Bulletin of Georgia, 22 August, 2001, No 25, Article 107

posal of disputable issues during the election process (e.g. — the review of allegations of inaccuracy in the voters' lists, etc.). And the jurisdiction of the Constitutional Court should cover the entire electoral process from the moment the elections are appointed, to the declaration of the results. The Electoral Administration should be comprised of public servants and act under the oversight of the Constitutional Court.

France utilizes an approximately similar system, where a quasi-judicial body — the Constitutional Council — carries out this function.[5] And in other countries (Denmark, Albania, Estonia, Latvia, Moldova, Poland, and Costa-Rica)[6] judges or other officials elected by the High Council of Magistrates are directly involved in the administration of elections.

The guidelines adopted on election issues by the Venice Commission (European Commission for Democracy through Law) are noteworthy; they are systematized in the Election Code approved by the EC Parliamentary Assembly in 2003. Namely, Article 75 of this Code stipulates that, usually an Election Commission should be comprised of: "a judge or a lawyer: in cases where the judicial body is assigned the responsibility of administering the elections, his independence should be guaranteed through the transparency of the process. The persons appointed by the court should not be subordinated to the election subjects."[7]

We can bring the following arguments in support of such a model in the resolution of these issues:

Firstly, the Constitutional Court is the most secure from governmental and party influence as it has a high degree of independence and extra possibilities for making impartial decisions;

Secondly, the exercising of the authority of the Constitutional Court in the field of elections, as stipulated by current legislation in force, will take place prior to the declaration of the results of the elections and not after. After which, the issue of the legitimacy of the election in question will be above reproach, and the elected official under the consent of the Constitutional Court will take office;

Thirdly, the judicial authority, which is usually separate from the legislative and executive branches, will be directly involved in the formation of these two authorities through the elections, which will serve as one of the significant additional guarantees for an adequate system of checks and balances between the branches of government.

[5] See *Constitutional Control in Foreign Countries*. Ed. V. V. Maklakov — M.: Norm, 2007, pg. 192-296

[6] M. Tomozek. *Judicial Control of Elections in the Czech Republic, Poland and Slovakia: Guarantee of Stability or Democratic Legitimacy?*: "Constitutional Justice, Messenger of the Conference of the Bodies of constitutional control of the countries of emerging democracies, Issue 2(36) 2007, pg. 111-120.

[7] See European Commission for Democracy through Law (Venice Commission). Election Code. Guidelines and the explanatory address. Adopted at the 52nd sitting of the Venice Commission (Venice, 18-19 October, 2002), Tbilisi, 2003, pg. 49.